SUPREME COURT, U. S.

AUG 14 1967

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IN THE

Supreme Court of the United States

October Term, 1967

No. 392

GILBERT P. BRUSH AND MONROE PERCY BLOCH, co-partners doing business under the firm name and style of BRUSH & BLOCH,

Petitioners,

against

THE REPUBLIC OF CUBA, and the INTERVENTORS OF F. PALICIO Y COMPANIA, S. A. CIFUENTES Y COMPANIA, POR LARRANAGA, S. A., MENENDEZ, GARCIA Y COMPANIA, LIMITADA, and TABACALERA JOSE L. PIEDRA, S. A.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August 14, 1967.

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Opinions Below

The District Court wrote an opinion which is reported at 256 F. Supp. 481, and appears in the Joint Appendix at 128a *et seq.* The opinion of the Court of Appeals (Pet. Appendix A) appears at 375 F. 2d 1011.

Jurisdiction

The judgment of the Court of Appeals was entered on April 26, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

(1) Whether the Hickenlooper Amendment to the Foreign Assistance Act of 1965, 22 U.S.C. Section 2370(e)(2) is applicable to this case which involves no questions of international law because the claimants are Cuban nationals making claims against their own government for property seized in Cuban territory.

(2) Whether there are any material questions of fact which required denial of the motion for summary judgment.

(3) Whether there is an absence of necessary parties and whether petitioners were equitably estopped from raising that claim on appeal for the first time.

(4) Whether petitioners' clients were denied their right of counsel.

Statute Involved

The statute involved is 22 U.S.C. § 2370(e)(2), generally known as the Hickenlooper Amendment to the Foreign Assistance Act of 1965, Pub. L. 171, 89th Cong., 79 Stat. 653, 659. The statute, a reenactment with minor changes of the Hickenlooper Amendment to the Foreign Assistance Act of 1964, Pub. L. 633, 88th Cong., 78 Stat. 1009, 1013 reads as follows:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this

subsection: *Provided,* That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

Statement

The relevant facts are not in dispute, having been stipulated in the District Court (J.A. 15a-99a).[1]

The respondent interventors are Cuban Government officials who, on September 15, 1960, pursuant to Cuban law, took possession on behalf of the Cuban Government of the businesses and assets located in Cuba of five leading Cuban manufacturers of cigars. Each of these Cuban concerns was a corporate or quasi-corporate entity organized in Cuba under Cuban law (J.A. 15a). At the time of the intervention "substantially all of the persons financially interested in * * * [the Cuban firms] were Cuban citizens residing in Cuba * * * and none was a citizen of the United States of America" (J.A. 16a).

The interventions were non-discriminatory and non-retaliatory, were in the interest of the Cuban economy, and included virtually all of the other cigar manufacturers in Cuba (J.A. 46a-70a). Intervention "is a procedure by which a Cuban Government-appointed 'interventor' is given complete possession and control of a business enterprise to the exclusion of the officers, directors, stockholders and

[1] References are to the Joint Appendix in the Court of Appeals.

partners or other persons who otherwise would exercise such possession and control" (J.A. 19a). Under Cuban law the interventors also have the exclusive right to represent the intervened enterprises in litigation (J.A. 20a, 48a, 102a). The interventions have continued to date except that Cifuentes y Compania was nationalized on June 29, 1961 by the Central Planning Board of the Republic of Cuba (J.A. 19a, 63a).

Pursuant to Cuban law, since September 15, 1960 the interventors, to the exclusion of officers, directors, stockholders or managers (herein called the former owners), manufactured and sold the tobacco products of the intervened and nationalized firms to importers throughout the world including those in the United States (J.A. 24a). As a result, large debts from most of the principal American importers accrued to the interventors (J.A. 24a-25a).

Petitioners are members of the New York bar who were retained by the former owners to attempt to collect the proceeds of the tobacco sold by the interventors. Petitioners, accordingly, instituted a series of actions in the District Court, each in the name of the Cuban firms and each against a tobacco importer which purchased the tobacco from the interventors after the interventions of September 15, 1960.[1a]

The instant action was instituted by the interventors to determine whether the interventors or the former owners were entitled to the unpaid purchase price of the cigars. In form, it was an action in the names of the Cuban firms for a declaratory judgment and to enjoin the petitioners from acting on behalf of the Cuban firms to recover the purchase price of the cigars.

Upon a detailed written stipulation of facts (J.A. 15a-99a) the District Court, Bryan, *J.*, granted the interventors summary judgment that they were entitled to assert on

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[1a] The petitioners' clients also sought an injunction and damages for trademark infringement and unfair competition (J.A. 16a-17a) an issue which is not before this Court.

behalf of the intervened and nationalized concerns the claims for the unpaid purchase price of the cigars sold by the interventors after they had seized the Cuban-located properties and ousted the former owners from possession. The District Court approved the procedure adopted by the interventors of a single plenary suit for the purpose of avoiding a multiplicity of actions (J.A. 104a-106a).

The court concluded that "though intervention does not appear to effectuate a formal transfer of title from the former owners and managers to the governmental authorities, the end result is indistinguishable in practical effect from complete confiscation" (J.A. 102a). It held that the decrees of intervention or nationalization involved in this case "are prototypes of acts of state to which the act of state applies" (J.A. 107a).

The District Court held that the Hickenlooper Amendment to the Foreign Assistance Act of 1964 22 U.S.C. § 2370(e)(2)[2] (herein called the Hickenlooper Amendment) was inapplicable because "all of the five entities which were intervened by the Cuban Government were Cuban business entities, organized under Cuban law and doing business in Cuba. Their plants and assets were on Cuban soil and operations were conducted there. Substantially all of the shareholders and other owners and the officers and directors were Cuban citizens residing in Cuba at the time of the intervention. None was a citizen of the United States" (J.A. 109a). Applying the rule that "acts of a state directed against its own nationals do not give rise to questions of international law", *Banco Nacional de Cuba* v. *Sabbatino*, 307 F. 2d 845, 861 (2d Cir. 1962), rev'd on

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[2] While petitioners addressed themselves to the 1964 Amendment, the 1965 Amendment in substantially the same terms was in effect at the time of judgment (J.A. 128a-130a). See *supra*, p. 2.

other grounds, 376 U.S. 398, the District Court held that here the assets of the five Cuban entities "come not within the purview of the Hickenlooper Amendment but rather within the specific exception excluding the application of the amendment 'in any case in which an act of a foreign state is not contrary to international law' " (J.A. 109a).

The court concluded that "under *Sabbatino* the act of state doctrine is plainly applicable here and proscribes this court from questioning the validity of the Cuban decrees by which the property of the five Cuban entities was intervened by the Cuban government" (*Ibid.*). The Court of Appeals unanimously affirmed Judge Bryan's decision (Pet. App. A, p. 22).

Argument

1. The Cuban nationals represented by the petitioners may not review the validity of the seizure of their Cuban businesses in the courts of the United States and the Cuban Government's interventors are entitled to the proceeds of the sales of tobacco made by them after the interventions and nationalizations. This Court reaffirmed the resolution of that very issue only three years ago in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398. In that case the validity of a Cuban decree establishing dominion over the property of an American-owned company could not be examined in American courts, either under rules of international law or domestic law. The entire Court unequivocally rejected the claim that a foreign decree affecting property within the territorial limits of the expropriating state may be measured against the public policy or domestic law of the forum. "[T]he forum may not apply its local law regarding foreign expropriation".[2a] 376 U.S. 398, 438.

[2a] Mr. Justice White, though dissenting in *Sabbatino*, agreed with prior decisions of this Court which "hold that a foreign act of state applied to persons or property within its borders may not be denied effect in our courts on the ground that it violates the public policy of the forum." 376 U.S. 398, 441.

Since, as Judge Bryan wrote (J.A. 107a), petitioners "do not seriously question that the act of stated doctrine would apply here" but for the Hickenlooper Amendment (J.A. 107a) the only issue here is whether the amendment is applicable. The Hickenlooper Amendment is inapplicable to this case since in terms it authorizes the courts to disregard the act of state doctrine only where the taking of property is in violation of "the principles of international law," *supra*, p. 2. Indeed, to emphasize this condition precedent the House of Representatives successfully insisted upon adding to Senator Hickenlooper's original proposal the additional mandate that the Amendment "not be applicable (1) in any case in which an act of a foreign state is not contrary to international law" (H. Rep. No. 1925, 88th Cong. 2d Sess. pp. 3, 16).[3]

No principles of international law are involved in the instant case since the petitioners' clients were Cuban nationals and "acts of a state directed against its own nationals do not give rise to questions of international law" (J.A. 108a) citing *inter alia U.S.* v. *Belmont*, 301 U.S. 324, 332 and *Pons* v. *Republic of Cuba*, 294 F. 2d 925 (D.C. Cir., 1961), *cert. den.* 368 U.S. 960. In the *Belmont* case this Court stated flatly that "[w]hat another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here" *supra* at 332. Accord, *Banco Nacional* v. *Sabbatino*, *supra*, pp. 430-31, 433, 438.

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[3] Of course, the Hickenlooper Amendment which passed the Senate on September 24, 1964, 110 Cong. Rec. 22785, was predicated upon "principles of international law, including the principles of compensation". But it did not have the significant emphasizing proviso which was adopted by the Conference Committee (H. Rep. No. 1925, 88th Cong. 2nd Sess.).

[4] Petitioners completely misstate Judge Bryan's decision in *Banco Nacional de Cuba* v. *Farr*, 243 F. Supp. 957 (S.D., N.Y., 1965) affirmed — F. 2d — (Pet. p. 16) since it was treated by the lower courts as a case involving the rights of American, not Cuban, citizens. Petitioners do not contend that anyone but Cuban nationals are involved in the present case (Pet. p. 10).

2. Petitioners' argument (Pet. pp. 14-16, 18) that foreign nationals may use the United States courts under the Hickenlooper Amendment in disregard of the act of state doctrine wherever they have been denied compensation by their own Government—where international law is not involved—is directly contrary to the language, purpose and legislative history of the Hickenlooper Amendment which is directed exclusively to violations of international law.

In 1964, Senator Hickenlooper, in proposing his Amendment, repeatedly advised the Senate that its purpose was to protect the rights of American investors[5] from the expropriation of their property in *violation of the principles* of international law.[6] The Senate Committee on Foreign Relations was equally explicit in limiting the Amendment to "a case in which an act of a foreign state is alleged to be contrary to international law", S. Rep. 1188, 88th Cong. 2d Sess., Part 1, p. 24. And "[t]he committee of conference amended the Senate language to pinpoint its precise effect, making it clear that it does not apply if no violation of international law principles is found." Conference Report, H. Rep. No. 1925, 88th Cong. 2d Sess., p. 16; see also 110 Cong. Rec. 23680. There is not the slightest suggestion in the Congressional Record or in the reports that the taking of property without compensation—absent a violation of international law—was within the scope of the Amendment.[7]

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[5] 110 Cong. Rec. 19546, 19557, 19559-19560. See also the reference in the House debate to "the security of our private investments abroad." 110 Cong. Rec. 23680.

[6] 110 Cong. Rec. 19547, 19556, 19557.

[7] The Hickenlooper Amendment was not discussed in the hearings before the Congressional committees which considered the proposals in 1964 to amend the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2151, *et seq.*, except for a passing nonmaterial reference in Hearings before the Senate Committee on Foreign Affairs, 88th Cong., 2d Sess., on S. 2659, 2660, 2662 and H. R. 11380 (1964) at 449. The House Committee Report is silent on the subject, H. Rep. No. 1443, 88th Cong., 2d Sess.

When the Hickenlooper Amendment came up for reconsideration in the 89th Congress, Senator Hickenlooper [8] and the proponents of the Amendment who represented American business concerns [9] and others [10] reiterated the fact that the amendment was intended to protect the rights of American citizens under international law. No Cuban nationals appeared and it was never suggested that their interests were to be vindicated by the renewal of the legislation. The Committee Reports [11] and the Congressional debates [12] confirmed this intention of the Congress.

However, the most devastating rejoinder to petitioners' present contention is found in Senator Hickenlooper's explicit statement to the Senate that Cuban nationals in particular were *not* protected by the amendment:

> "The bill expressly provides that it has no application to cases in which no violation of international law principles, including the principles set out in subsection 620(e)(1), is found. Thus, our courts are protected from an influx of claims by persons who were nationals of the foreign state at the time such state took the action which is challenged." (111 Cong. Rec. 13544-5).

3. The petitioners seem to argue either that international law or domestic public policy—which, it is not clear—are applicable to the present case because it involves "a Cuban extra-territorial confiscatory decree, where title to the property sought to be confiscated always remained in the original owners" (Pet. p. 3). The seizure of the

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[8] 111 Cong. Rec. 13544-5.

[9] Hearings before the House Committee on Foreign Affairs, 89th Cong., 1st Sess., on H.R. 7750 (1965) 576-620, 1022, 1297-1298.

[10] *Id.* at 1026, 1234-5, 1241, 1252.

[11] S. Rep. No. 170, 89th Cong. 1st Sess., 19-20 H. Rep. No. 321 89th Cong. 1st Sess., 31-32.

[12] Cong. Rec. 13503-4, 13539-45.

Cuban firms' businesses in Cuba was no more extra-territorial here than was the seizure of the sugar involved in the *Sabbatino* case and both suits were for the recovery of the purchase price of the products sold abroad by the Cuban Government after the nationalizations. Similarly, it makes no difference whether the tobacco here was in existence at the time of the seizure (Pet. p. 6). The fact of substance here, as in *Sabbatino,* is that Cuba had exercised dominion over the property, which was located in Cuba at the time of the government taking.

The petitioners argue that because technical title under Cuban law did not vest in the interventors, the Cuban Government is not entitled under the act of state doctrine to the proceeds of the products sold by them abroad. Judge Bryan answered this by agreeing with the petitioners that their properties had been confiscated in Cuba (J.A. 102a); and that "for almost six years the former owners have been ousted without their consent from all the proper ties and excluded from any participation in the businesses. Their rights to any receipts and profits have been elimiated. No compensation has been provided" (J.A. 102a).

The act of state doctrine is not dependent upon a formal transfer of title as petitioners seem to argue. Any act of the Cuban Government performed within its territory is a sovereign act, not reviewable in our courts. *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398. A governmental act may be a tortious personal injury, *Underhill* v. *Hernandez,* 168 U.S. 250. It may be a course of conduct of which confiscation is but a part, *American Banana Company* v. *United Fruit Company,* 213 U.S. 347. It may be an interference with contractual rights, *Holzer* v. *Deutsche Reichsban-Gesellschaft,* 277 N.Y. 474 (1938); *Kleve* v. *Basler Lebens-Versicherungs-Gesellschaft,* 182 Misc. 776 (1943). It may simply be an arrest, *United States ex rel. Von Heymann* v. *Watkins,* 159 F.2d 650, 652 (2d Cir. 1947).

The intervention of the Cuban firms was a governmental seizure of control, a public act resulting in an effective ouster of the former management from any control, and in an equally effective assumption of control by the Cuban Government. The question of technical title is clearly irrelevant in the present context,[13] although it might possibly have relevance in future negotiations between the Cuban Government and its own nationals, the former owners. The petitioners would be in no stronger position if the courts below had made a finding, not of confiscation but of an assumption of management of the Cuban concerns similar to equity receiverships in American law, which authorizes the seizure and administration of businesses. *Cf.* New York Insurance Law, §§ 511, 512; Banking Law, §§ 619-1(b); Public Service Law, §§ 57, 63(g), 74, 87, 89-m, 103, 169.[14]

4. Petitioners make a subsidiary argument—not clearly relevant to the Hickenlooper Amendment point—that the interventors' claims have their "situs" in this country (Pet. p. 15). Plainly, this case involves debts due to the Cuban Government in Havana where the sales took place and where title passed. In common law, the situs of personal property is at its owner's domicile, *Blodgett* v. *Silberman*, 277 U.S. 1. Only recently this Court in *Texas* v. *New Jersey*, 379 U.S. 674, reaffirmed the doctrine that the creditor's domicile is the situs of a debt. If the act of state doctrine is controlling the Cuban Government which sold the tobacco is entitled to payment for it in the United States or elsewhere. That is precisely the situation in the *Sabbatino* case where payment had been sought and refused in the United States.

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[13] Indeed, the Hickenlooper Amendment refers to "a confiscation or other taking", *supra*. p. 2.

[14] See also, *e.g.*, *Decker* v. *Gardner*, 124 N.Y. 334 (1891), *Keeney* v. *Home Insurance Co.*, 71 N.Y. 396 (1877), *Herring* v. *New York, L. E. & W. R. Co.*, 105 N.Y. 340 (1887) where temporary receivers without title are entitled to the possession of property.

5. The petitioners having entered into a stipulation with respect to the material facts (J.A. 152), now claim that summary judgment was improper because of "reservations" which accompanied the stipulation (Pet. p. 19). Since the petitioners do not argue that there is a dispute over any relevant facts, there is no occasion to disturb the contrary conclusion of the two lower courts.

6. After six years of litigation petitioners for the first time raised in the Court of Appeals the claim that necessary parties-defendant were missing because neither the interventors nor the stockholders and officers of the Cuban concern were parties to the action.

A. The formal parties to the litigation below are the Cuban business entities on the one hand and the petitioners on the other. They respectively represented the interventors appointed by the Cuban Government, and the former owners who filed affidavits on the merits. The action was instituted because petitioners had instituted numerous lawsuits upon the instructions of the former owners to recover the purchase price of the cigars sold by the interventors—suits which only the interventors were authorized to bring. The interventors could have intervened in each of those actions and raised the same issues involved in the present lawsuit. But that would have required a multiplicity of actions and would have embroiled the importer-distributors in litigation with which they had no concern. The alternative procedure adopted was well suited to secure an adjudication of these issues, as Judge Bryan held below (J.A. 104a-105a).

There was no absence of necessary parties since both the interventors and the former owners were and are in privity with the formal parties to the action. Since they respectively controlled the litigation, *Souffront* v. *La Compagnie des Sucreries*, 217 U.S. 475, and they were adequately represented by the formal parties to the action, Restatement, *Judgments*, § 83 (1942) with whom they had a

fiduciary relationship, *Heckman* v. *United States*, 224 U.S. 413, there was no absence of necessary parties.

B. The defendants are estopped from raising an issue for the first time upon this appeal in an effort to avoid the judgment below. See, *e.g.*, *Parker Rust-Proof Co.* v. *Western Union Telegraph Co.*, 105 F. 2d 976 (2d Cir. 1939) *cert. denied*, 308 U.S. 597. They cannot be permitted to argue in effect that their stipulation was a sham so that they can now avoid the judgment based upon it.

7. Petitioners assert that the decision below "offends our morals and violates our public policy" (Pet. p. 19). The case cited by the petitioners, *Zwack* v. *Kraus Bros. & Company*, 237 F. 2d 255 (2d Cir. 1956) involved assets within the United States at the time of the expropriation decree. This is not the case here; hence the court below was correct in recognizing that its earlier decision in *Zwack* had no bearing on the interventors' right to recover the purchase price of the cigars shipped by them from Cuba after the interventions.

8. Petitioners' final argument is that their clients were denied due process because "the court substituted lawyers selected by the Cuban Government to represent the plaintiffs in the prosecution of the" actions for the recovery of the accounts receivable (Pet. p. 20). This is simply another way of challenging the procedure followed by the interventors for the purpose of determining who was entitled to sue for the proceeds of the tobacco.

Conclusion

The two courts below have correctly held that this Court's decision in the *Sabbatino* case is controlling, and that the Hickenlooper Amendment is not applicable to suits by Cuban nationals against their own government in the courts of the United States. This decision, which is compelled both by a reading of *Sabbatino* and the earlier

act of state cases and by the language, purpose and legislative history of the Hickenlooper Amendment, is not in conflict with any decision in any other circuit.

The serious problems of the construction, application and constitutionality of that Amendment will undoubtedly be carefully considered when cases involving the claims of American citizens reach this Court. But this is not such a case and accordingly the petition for certiorari should be denied.

Respectfully submitted,

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